Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM G. GRADY, ADMINISTRATOR,
SHIRLEY JAKABOSKI, INTERVENOR,

Petitioners,

vs.

TOWN AND CITY OF MIDDLETOWN,
JAMES PARKER, LOUIS TOSTO, and JOHN LATERRA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

MUST THE TRIAL COURT GRANT SUMMARY JUDGMENT, ON THE GROUND OF QUALIFIED IMMUNITY, IN FAVOR OF POLICE OFFICERS SUED FOR UNREASONABLE FORCE, AND THUS DENY PLAINTIFFS A JURY TRIAL, ANY TIME THE OFFICERS SUED ARE ABLE TO PRODUCE AN EXPERT WITNESS FAVORABLE TO THEM, WHETHER OR NOT THAT EXPERT IS CONTRADICTED BY AN EXPERT WITNESS FOR THE PLAINTIFFS?

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, William G. Grady, Administrator, and Shirley Jakaboski, Intervenor, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on April 22, 2002, and was not published. It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut upon which the Court of Appeals based its ruling was rendered on March 29, 2001. It also was not published. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall . . . deprive any person of . . . property without due process of law. . . . "

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This was an action for the unreasonable use of deadly force against a police officer who shot the son of petitioner Shirley Jakaboski in the back of the head during a struggle associated with his arrest on misdemeanor charges in his own home. Two other officers present at the shooting were sued for their failure to intervene in the struggle and the City of Middletown, Connecticut, which employed all the officers, was sued only for indemnification under state law. The action was brought originally in state court but was removed by the defendants to the United States District Court. Summary judgment was granted in favor of all defendants on the ground of qualified immunity and that ruling was affirmed on appeal.

The cause of Alex Jakaboski's death was never in dispute. He was shot in the back of the head at point-blank range by a police officer. It was the circumstances of that shooting that produced the opinions below.

Middletown police officers responded to a call by the decedent's mother at about 8:00 p.m. on the evening of November 27, 1994. She reported that she was having difficulties with her son, Alex, that he had struck her, knocked over a bureau and punched a hole in the wall of their apartment.

The first two officers on the scene were respondents Parker and Laterra. Sergeant Tosto arrived soon after. Parker and Laterra knocked on the door and observed a person peeking out from behind the window blinds in the unit. They could hear a radio or television playing inside. Eventually Alex Jakaboski opened the door but refused to grant permission to enter the home.

Shirley Jakaboski arrived as the officers were speaking to her son in the doorway. She invited the officers inside so they could investigate her complaint. She told the officers that she had been having problems disciplining her son and that they had argued about his homework and his use of alcohol. She stated further that her son had knocked over a bookcase, kicked a hole in the bedroom wall and struck her several times. The officers observed damage to the apartment consistent with her complaint.

The officers decided to arrest Alex for misdemeanor violations of Connecticut's family violence statutes. Officer Parker told Alex he was about to be arrested and ordered him to put down a soda can he was holding and turn around to be handcuffed. As Parker took out his handcuffs, Alex extended his arms rigidly in front of him, stiffened

and attempted to turn away. During the ensuing struggle, Parker sprayed an irritant called Capstun at Alex, to no apparent effect, and the struggle continued. The officers then used take-down procedures to throw the arrestee to the floor. He initially lay face down on the floor with his hands beneath his body. Although the officers ordered him to remove his arms from beneath his body, he refused and the struggle continued.

Officer Parker then managed to pry loose Alex's left arm and Officer Laterra was able to place a handcuff on his left wrist. While attempting to turn him over, Sergeant Tosto observed for the first time that Alex was holding a handgun. The officers immediately rolled him back onto his stomach, thus placing a barrier between themselves and the gun. They ordered him to release the gun but were unable to observe whether he had complied. A gun fired twice and the officers assumed it was the gun beneath Alex's body. One of the bullets passed through Alex's thigh and lodged in a nearby wall. Alex then attempted to rise and as he did so, Officer Parker fired two rounds, point-blank and execution style, into the back of his head, killing him instantly. When Alex's body was rolled over, he was found to have a .45 caliber pistol in his right hand. Investigators later determined that the gun belonged to his mother.

Larry F. Jetmore, Ph.D., a retired Captain in the Hartford Police Department, reviewed the case and submitted a written opinion that the killing of Alex Jakaboski "does not meet the test of what a reasonable police officer would do under the same or similar circumstances." Noting that the deceased's head "was very near to, if not in contact with the floor when at least one of the projectiles

impacted the back of his head," Captain Jetmore concluded: "Testimony of the officers indicates that when Alexander Jakaboski was shot, Sergeant Tosto was holding onto his right hand/wrist and Officer Laterra was holding onto the cuff on Alexander Jakaboski's left hand. Neither Sergeant Tosto nor Officer Laterra had his weapon drawn. Sergeant Tosto and Officer Laterra were still using compliance and control tactics to mitigate the threat posed by Alexander Jakaboski when Officer Parker fired two shots into the rear of Alexander Jakaboski's head. Officer Parker's decision to fire a shot to kill (back of the head as opposed to center mass) does not meet the test of what a reasonable police officer would do under the same or similar circumstances. . . . "

Moving for summary judgment on qualified immunity grounds, the defendants countered the Jetmore affidavit with a report by an Assistant State's Attorney and a written review by the State Police Forensic Science Laboratory, both of which concluded that Officer Parker had not used unreasonable force in the shooting.

Affirming the grant of summary judgment to all defendants, the Court of Appeals assumed, *arguendo*, "that the officers used force that was sufficiently unreasonable under the Fourth Amendment to constitute excessive force," but held that the very fact that the defendants had produced experts in support of the alleged reasonableness of their actions, despite the contrary view of the plaintiffs' expert, "lends credence to the conclusion that reasonable officers could differ in their opinion of the propriety of the force employed. . . . Because the evidence establishes that 'officers of reasonable competence could disagree on the legality of the defendant's actions,' the objective

reasonableness test is met, and the defendants are entitled to qualified immunity." *Citing Malley v. Briggs*, 475 U.S. 335, 341 (1986).

REASONS FOR GRANTING THE WRIT

THE PLAINTIFF IN A SUIT FOR WRONGFUL USE OF DEADLY FORCE UNDER 42 U.S.C. § 1983, WHOSE CLAIM IS SUPPORTED BY SUFFICIENT FACTUAL AND EXPERT EVIDENCE, CANNOT BE DENIED HER RIGHT TO A JURY TRIAL MERELY BECAUSE THE DEFENDANT POLICE OFFICER IS ABLE TO PRODUCE CONTRARY EVIDENCE FROM ANOTHER EXPERT WITNESS

The affirmative defense of qualified immunity affords immunity to "government officials performing discretionary functions" only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . " *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). A police officer enjoys such immunity only if a reasonable police officer, under the circumstances as they existed, could have believed that his actions were lawful. *Anderson v. Creighton*, 483 U.S. 635 (1987).

The qualified immunity defense does no more than limit liability to those cases where "the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . So conceived, the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying [the criminal counterpart to Section 1983]. . . . [B]oth serve the same objective, and in effect the qualified

immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.'" *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 1227 (1997).

The burden of pleading and proving the affirmative defense of qualified immunity rests upon the defendant claiming its benefit. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Harlow v. Fitzgerald*, *supra*, at 815.

The issue presented by this case is whether, when there exists a genuine factual dispute concerning the qualified immunity defense in a Section 1983 case, the trial judge may nevertheless use the very existence of that factual dispute to deprive a plaintiff of her Seventh Amendment right to a jury trial. As was said very recently in the context of the Sixth Amendment right to a jury trial in criminal cases, "our people's traditional belief in the right of trial by jury is in perilous decline." *Ring v. Arizona*, ___ U.S. ___, 70 U.S.L.W. 4666, 4674 (2002) (Scalia, J., concurring). The ruling of the Second Circuit in this case contributes to that decline in the context of civil litigation of a kind only slightly less important than a criminal trial.

Harlow immunity is not, strictly speaking, a jury question although juries often are called upon to resolve factual disputes which are necessary predicates to deciding the qualified immunity defense. *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987); *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995); *Warren v. Dwyer*, 906 F.2d 70 (2d Cir. 1990); *Finnegan v. Fountain*, 915 F.2d 817, 821 (2d Cir. 1990);

Holt v. Artis, 843 F.2d 242, 245-46 (6th Cir. 1988); *Dominque v. Telb*, 831 F.2d 673 (6th Cir. 1987); *Alvardo v. Picur*, 859 F.2d 448, 451 (7th Cir. 1988); *Llanguno v. Minguey*, 763 F.2d 1560 (7th Cir. 1985) (*en banc*); *Gainor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992); *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1567 (11th Cir. 1992); *Ansley v. Heinrich*, 925 F.2d 1399 (11th Cir. 1991).

The fact question whether a belief or state of mind, asserted by an officer as his affirmative qualified immunity defense, was indeed objectively reasonable, always has been considered a jury question. It is not only proper, but is mandatory, to submit the issue of objective reasonableness to the jury when it is properly pled and there is defense evidence to support it. *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir. 1994); *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998); *Presley v. City of Benbrook*, 4 F.3d 405 (5th Cir. 1993). See *Jensen v. City of Oxnard*, 143 F.3d 1078, 1086 (9th Cir. 1998) (whether it was reasonable for a police officer to shoot a fellow officer, working undercover, in the course of a SWAT raid was fact-dependent and could not be decided on summary judgment).

The qualified immunity defense to an unreasonable force claim is especially likely to require a jury determination of disputed facts. As the Second Circuit pointed out in *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991), the qualified immunity defense to a claim of excessive force ordinarily will be limited to the question of whether "it was objectively reasonable for [the officer] to believe at the time of the challenged action that his actions were lawful." 944 F.2d at 95. That determination is almost always dependent on factual determinations and therefore will rarely if ever be one which can be resolved on a motion for summary judgment. See also *Spann v. Rainey*, 987 F.2d 1110 (5th

Cir. 1993); *Sheth v. Williams*, 137 F.3d 1447 (11th Cir. 1998).

While a jury cannot decide the legal component of the qualified immunity defense, the jury should be and ordinarily is given fact interrogatories the answers to which then decide the qualified immunity defense. *E.g.*, *Pouillon v. City of Owosso*, 206 F.3d 711, 718 (6th Cir. 2000) (Boggs, J.). On the other hand, in a simple case where the only qualified immunity question is whether a reasonable officer could have believed that the conduct in question was prohibited, it may be permissible to package it all together into a general verdict without interrogatories. *Sikes v. Gaytan*, 218 F.3d 491 (5th Cir. 2000).

In this case, however, in the face of long precedent and a common sense application of the right to a jury trial in civil cases, the Second Circuit has held in effect that any time a defendant can produce a witness to support his position on a qualified immunity question, the mere existence of the witness deprives the plaintiff of her right to have that witness's credibility and reliability assessed by a jury. That ruling represents a stunning change in the law and requires the review of this court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

William G. Grady and
Shirley Jakaboski, Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Apr. 22, 2002)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of April two thousand and two.

Present: RALPH K. WINTER,
JOSEPH M. McLAUGHLIN,
ROSEMARY S. POOLER,
Circuit Judges.

WILLIAM G. GRADY, ADMINISTRATOR, SHIRLEY JAKABOSKI, INTERVENOR,

Plaintiffs-Appellants,

-v-

TOWN and CITY OF MIDDLETOWN, JAMES PARKER, LOUIS TOSTO, and JOHN LATERRA,

Defendants-Appellees.

(Docket No. 01-7466)

Appearing for Appellants:

Norman A. Pattis, New Haven, CT

Appearing for Appellee:

Elliot B. Spector, West Hartford, CT

Appeal from the United States District Court for the District of Connecticut (Robert N. Chatigny, *Judge*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiffs-Appellants William G. Grady, administrator of the estate of Alex Jakaboski, and Shirley Jakaboski, intervenor and mother of Alex Jakaboski, appeal from the March 29, 2001 Ruling and Order of the United States District Court for the District of Connecticut (Robert N. Chatigny, *Judge*), granting defendants-appellees' motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56(c).

The district court found that the undisputed evidence established the following facts: that on November 27, 1994, Shirley Jakaboski called the Middletown Police Department from a friend's house and requested assistance. She reported to the dispatcher that her son, Alex Jakaboski, hit her, knocked over a bureau, and kicked a hole in the wall. She stated that she wanted the police to talk with her son, tell him not to hit his mother, and tell him he had to receive counseling. In answer to questions about the presence of weapons in the house, Mrs. Jakaboski stated that Alex had a BB gun and a hunting bow and that she had a rifle of which

he was not aware. She specifically denied the existence of a handgun.

Eventually, the police, Mrs. Jakaboski, her friend, and the three defendant police officers all arrived at Mrs. Jakaboski's apartment and found Alex Jakaboski inside. After confirming Mrs. Jakaboski's version of events, the police officers decided to arrest Alex for violating various provisions of Connecticut's family violence laws. It is undisputed that Alex actively resisted arrest, refused to allow the officers to handcuff him, fought their attempts to restrain him, and struggled with them. During the course of the struggle, the police pinned Alex on the ground. It is also undisputed that, after rolling Alex onto his side, Officer Tosto, shouted, "46," and then, "gun," in response to seeing Alex holding a handgun. After that, two shots were fired from Alex's gun, and Officer Parker then fired two fatal shots into the back of Alex's head.

Plaintiff's filed this action, pursuant to 42 U.S.C. § 1983, alleging that defendants used excessive force, in violation of the Fourth Amendment, along with a state law negligence claim. After plaintiffs engaged in lengthy discovery, employed different lawyers, and changed key points of their position numerous times, the court considered defendants' motion for summary judgment. Ultimately, the court granted defendants' motion, finding that all the officers used force that was reasonable under the Fourth Amendment, and that even if the force used was excessive, they were entitled to qualified immunity. On appeal, plaintiffs challenge both the district court's rulings that the force used was reasonable and that defendants are entitled to qualified immunity for the use of any unreasonable force.

We review the district court's grant of summary judgment *de novo*. *See Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998). As the district court did, we must first consider whether plaintiffs have established a violation of the Fourth Amendment before we consider a qualified immunity defense. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). To determine the reasonableness of the force used, courts must balance the manner of the seizure – when and how it was made – against the police interests, *see Graham v. Connor*, 490 U.S. 386, 395-96 (1989), and must consider "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *id.* at 396. At all times, the court must evaluate the situation "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

Plaintiffs do not challenge the propriety of the use of force. Rather, they challenge only the *degree* of force used, contending that the use of *deadly* force was unreasonable. The only evidence plaintiffs offer in support of this conclusion is their expert's report, which offers the opinion that the shooting was not reasonable. This evidence may not be strong enough to survive summary judgment. Plaintiffs do not dispute that the officers were responding to a request for help from the mother of the suspect-victim, that they were aware that Alex had a violent nature and had recently attacked his mother, and that he actively resisted arrest and did not respond to less forceful attempts to control him. When Officer Tosto saw the gun and notified the other officers of its existence, Alex fired two shots at them. Under these

circumstances, it is not clear that Officer Parker acted unreasonably in shooting Alex.

Assuming, *arguendo*, that the officers used force that was sufficiently unreasonable under the Fourth Amendment to constitute excessive force, we find that the defendants are entitled to qualified immunity. "A qualified immunity defense is established if (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996). "The objective reasonableness test is met – and the defendant is entitled to immunity – if officers of reasonable competence could disagree on the legality of the defendant's actions." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995) (internal quotations omitted). Plaintiffs again point to their expert report to argue that "[a] reasonable jury could believe and credit the testimony of the plaintiff's expert" that the shooting was not reasonable and that no reasonable officer would find the shooting reasonable. However, plaintiffs misunderstand the standard for granting summary judgment based on a qualified immunity defense. The disagreement among the experts does not establish a material factual dispute. The differing expert opinions evidence a legal dispute about the reasonableness of the officers' conduct. In fact, it lends credence to the conclusion that reasonable officers could differ in their opinion of the propriety of the force employed. "[I]f the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendants' conduct under the circumstances, summary judgment for the officers is appropriate." *Lennon*, 66 F.3d at 421. Because the evidence establishes that "'officers of reasonable

competence could disagree' on the legality of the defendant's actions," the objective reasonableness test is met, and defendants are entitled to qualified immunity. *Salim*, 93 F.3d at 91 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). We affirm the grant of summary judgment on this ground.

We have considered the plaintiffs' remaining arguments and find them to be without merit.

Accordingly, the judgment of the district court is **AFFIRMED.**

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk
By:

/s/ Lucille Carr